

Minister for Home Affairs, Malaysia & Anor v Karpal Singh (No 2)SUPREME COURT (KUALA LUMPUR) – CRIMINAL APPEAL
NO 20 OF 1988ABDUL HAMID AG LP, HASHIM YEOP A SANI AND
HARUN SCJJ
18 AND 19 JULY 1988*Criminal Procedure – Habeas corpus – Applicant set at liberty by court – Appeal by applicant on other grounds – Whether applicant has right of appeal – Criminal Procedure Code, (FMS Cap 6), ss 365(2)(b) & 374 – Courts of Judicature Act 1964, s 50(1)**Preventive Detention – Application for habeas corpus – Whether detainee has a right to be present in court – Discretion of court – Internal Security (Detained Persons) Rules 1960, r 93(1)*

In this case the respondent had applied for an order of habeas corpus in regard to his detention under the Internal Security Act. The respondent succeeded in his application and he obtained an order that he be set at liberty – see [1988] 1 MLJ 468. The Public Prosecutor appealed against the decision of the High Court and the respondent also cross-appealed. At the hearing of the appeal, the deputy public prosecutor raised two preliminary objections (a) to the notice of appeal filed by the respondent and (b) to the presence of the respondent at the hearing of the appeal.

Held: (1) The respondent had succeeded in his application for habeas corpus and obtained an order that he be set at liberty. He is therefore not an aggrieved person to entitle him to appeal under s 365 of the Criminal Procedure Code.

(2) The respondent is also precluded from appealing pursuant to s 50(1) of the Courts of Judicature Act 1964, which confers jurisdiction on the Supreme Court to hear and determine any appeal by any person convicted or otherwise found guilty by the High Court in the exercise of its original jurisdiction.

(3) The respondent's appeal is therefore struck out.

(4) Generally in cases where the issue of a writ of habeas corpus is sought, it is not the practice to allow the presence of the detainee. Rule 93(1) of the Internal Security (Detained Persons) Rules 1960 cannot be invoked to secure the presence of a detainee in any criminal or civil court notwithstanding that it is the detainee's choice to argue his own case. The rule clearly envisages that the discretion should only be exercised in circumstances where the court itself requires the presence of the detainee, for instance where the court is satisfied that a detainee is a necessary witness to a criminal or civil matter before the court or where it would occasion a failure of justice to deny the presence of a detainee to argue his own case.

(5) Prima facie, the power to issue an order requiring the presence of a detained person is discretionary and that being so it should be exercised judicially. It is a matter essentially for the court to be satisfied that it does require the presence of a detainee and that his presence is, having regard to the whole of the circumstances of the case, necessary.

[Editorial Note: The decision on the substantial appeal is reported at [1988] 3 MLJ 29.]

Case referred to

1 *Re Greene* (1941) 57 TLR 533 (folld)

A Legislation referred to

Courts of Judicature Act 1964 s 50(1)

Criminal Procedure Code (FMS Cap 6) ss 365, 374

Internal Security (Detained Persons) Rules 1960 r 93(1)

Appeal from: Criminal Application No 54-1-88 (High Court, Ipoh)

B

Ng Aik Guan (Deputy Public Prosecutor) for the appellants.

Respondent in person.

Cur Adv Vult

C

Abdul Hamid Ag LP (delivering the ruling on preliminary objections): At the hearing of the appeal, Mr Ng Aik Guan, deputy public prosecutor, raised two preliminary objections, first: to the notice of appeal filed by Mr Karpal Singh (the respondent); second: to the presence of the respondent at the hearing of this appeal.

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As for the first, it is the contention of Mr Ng that the respondent has no right to appeal as he is not an aggrieved person under s 374 of the Criminal Procedure Code (FMS Cap 6) ('the Code') which states that:

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Any person aggrieved by any decision or direction of the High Court under this Chapter may appeal to the Supreme Court within thirty days from the date of the decision or direction appealed against.

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Section 374 of the Code comes under Chapter XXXVI dealing with directions of the nature of a habeas corpus application and s 365(2)(b) under the same Chapter empowers the High Court, whenever it thinks fit, to order any person who is to be illegally or improperly detained in public or private custody to be set at liberty. The words 'decision or direction' under s 374 of the Code clearly must necessarily refer to the final decision or direction made under s 365 of the Code. The respondent succeeded in his application and obtained an order that he be set at liberty. He is therefore not an aggrieved person to entitle him to appeal.

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Our view is that the respondent is also precluded from appealing pursuant to s 50(1) of the Courts of Judicature Act 1964 which confers jurisdiction on the Supreme Court to hear and determine any appeal by any person convicted or otherwise found guilty by the High Court in the exercise of its original jurisdiction.

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Accordingly, the respondent's appeal is hereby struck out.

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As for the respondent's presence in this appeal, it was Mr Ng's contention that in proceedings relating to an application for a writ of habeas corpus or any appeal in respect thereof, there is no necessity for a detainee to be present in court. He argued that it was not proper for Peh J in the court below to issue an order under r 93(1) of the Internal Security (Detained Persons) Rules 1960 address-

sed to the superintendent to produce the respondent in court. Rule 93(1) reads:

Whenever the presence of a detained person is required by any court of civil or criminal jurisdiction such court may issue an order addressed to the superintendent requiring production before the court of such person at the time and place to be named in such order, and the said superintendent shall cause the person named in such order to be brought up as directed, and every such court may by endorsement on such order require the person named therein to be again brought up at any time to which the matter wherein such person is required may be adjourned.

The decision of Peh J to allow the respondent to be present was solely to enable the respondent to argue his own case. The learned judge observed that the respondent's application for a writ of habeas corpus was an urgent application and it was to avoid an adjournment of the hearing that he allowed the presence of the respondent. He was further of the view that, in fairness, the respondent should be allowed to argue his own case.

The learned judge therefore proceeded on the footing that it was the circumstances of that case that made him decide to allow the respondent to be present to argue his own case. So far as appears from the grounds relied upon by the learned judge the issue turned wholly upon the question whether, on a matter of construction of r 93(1), a detainee's preference to argue his own case was sufficient ground to allow him to be present. Generally, in cases where the issue of a writ of habeas corpus is sought, it is not the practice to allow the presence of a detainee. 'While the court has the right to hear any applicant in person, it will not as a rule hear in person the applicant for a writ of habeas corpus. There should be no departure from that practice unless sufficient ground is shown for it, and it is not sufficient ground merely that the applicant prefers to act as his own advocate': see *Re Greene*.¹

We are of the view that r 93(1), on its proper construction, cannot be invoked to secure the presence of a detainee in any criminal or civil court notwithstanding that it is the detainee's choice to argue his own case. The rule clearly envisages that the discretion should only be exercised in circumstances where the court itself requires the presence of the detainee, for instance, where the court is satisfied that a detainee is a necessary witness to a criminal or civil matter before the court, or where it would occasion a failure of justice to deny the presence of a detainee to argue his own case. In the latter case, the court must be satisfied, on an application by the detainee, that there are valid reasons for the detainee to be personally present to argue his own case. From this view, it follows that prima facie the power to issue an order requiring the presence of a detained person is discretionary and that being so it shall be exercised judicially. It is a matter essentially for the court to be satisfied that it does

A require the presence of a detainee and that his presence is, having regard to the whole of the circumstances of the case, necessary.

Order accordingly.

Solicitors: *Karpal Singh & Co*

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Reported by *Prof Ahmad Ibrahim*

C **Su Meu Ging v Philip Yong Khiam Poon & Ors and other appeals**

SUPREME COURT (KUCHING) - CIVIL APPEALS NOS 329, 330, 337, 338, 339, 340, 341, 342, 347, 348, 349, 351 AND 352 OF 1986

LEE HUN HOE CJ (BORNEO), WAN SULEIMAN AND SYED AGIL BARAKBAH SCJJ

D

10 APRIL AND 14 AUGUST 1987

Land Law - Housing developers - Agreement between registered proprietors and developers for building houses on land - Lots sold to purchasers by developer - Claim by purchasers for specific performance and compensation - Purported cancellation of agreement between registered proprietors and developers - Caveat by purchasers - Application to remove caveats - Balance of convenience

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The respondents who were registered proprietors of certain lands in Sarawak had entered into an agreement for the development of the lands with developers, who were to build houses on the lands. The developers sold certain lots to the appellants, some as vacant lots, some with houses. There was delay in the development and the appellants applied for specific performance and for compensation. The registered proprietors purported to cancel their agreement with the developers. The purchasers had lodged caveats against the lands. The respondent applied to have the caveats removed. The learned trial judge held that the appellants were entitled to lodge the caveats but they could not maintain or continue their caveats as the development agreements had been terminated. The appellants appealed.

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Held, allowing the appeal: (1) In this case the developers had acted as agents for the landowners in disposing of the lots. The purchasers had paid the full amounts and the landowners had therefore parted with their interest and were merely trustees for the purchasers.

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(2) Whether there was collusion or fraud between the landowners and the developers could only be decided at the trial and not on affidavit evidence.

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(3) The appellants had shown their claim to an interest in the property and had raised a serious question to be tried and on the balance of convenience it would be better to maintain the status quo.

Cases referred to

- 1 *Temenggong Securities Ltd & Anor v Registrar of Titles & Ors* [1974] 2 MLJ 45 (refd)
- 2 *Eng Mee Yong & Ors v V Leitchumanan* [1979] 2 MLJ 212 (folld)